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No. 90-1872

In The

Supreme Court of the United States

October Term, 1991

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY, AND
HOUSTON GENERAL INSURANCE COMPANY,

Petitioners,

vs.

MISSISSIPPI STATE HIGHWAY COMMISSION AND
DOES I THROUGH XX, INCLUSIVE,

Respondents.

Petition For A Writ Of Certiorari To The Mississippi Supreme Court

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

JURISDICTION 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Briggs vs. Benjamin, 467 So.2d 932 (Miss. 1985) 4

Chatham vs. Johnson, 195 So.2d 62 (Miss. 1967)..... 4

Davis vs. Packard, 31 U.S. 41 (6 Pet. 41) (1832)..... 3

Ferguson, et al. vs. Watkins, 448 So.2d 271 (Miss. 1984)..... 4

J.E. Riley Inv. Co. vs. Commissioner of Internal Revenue, 311 U.S. 55 (1940) 4

M'Clung vs. Silliman, 19 U.S. 598 (6 Wheat. 598) (1821)..... 3

Robinson vs. Ariyoshi, 441 F.Supp. 559 (D. Hawaii 1977)..... 4

Robinson vs. Ariyoshi, 887 F.2d 215 (9th Cir. 1989)..... 5

Taylor vs. F. & C. Contracting, Inc., 362 So.2d 625 (Miss. 1978) 4

Webb vs. Webb, 451 U.S. 493 (1981)..... 2, 3, 5

STATUTES

28 U.S.C. §1257..... 1

RULES

Rule 21.1 (h), Rules of the United States Supreme Court 1

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The Mississippi State Highway Commission files its Response to Petition for a Writ of Certiorari, and asks the Court not to grant certiorari in the above referenced action.

JURISDICTION

Since the Constitutional question raised in this Petition was not raised in the Mississippi Supreme Court, this Court is without jurisdiction. 28 U.S.C. §1257. Rule 21.1

(h), Rules of Supreme Court of the United States. *Webb vs. Webb,* 451 U.S. 493 (1981).

REASONS FOR DENYING THE WRIT

I.

The United States Supreme Court Does Not Have Jurisdiction In this Case

The federal question which petitioner asserts in this case was not raised below. Therefore this Court is without jurisdiction and should refuse to grant certiorari.

The U.S. Supreme Court will hear a case arising from a state court judgment only when the record shows that the federal issue was properly raised by petitioner below, *Webb vs. Webb,* 451 U.S. 493. At no time during the state court proceedings in this action did petitioner raise the constitutional issue now being asserted. It does not appear in any of petitioners' briefs, nor is it addressed in the opinion of the Mississippi Supreme Court.

The fatal jurisdictional defect of failing to raise a federal issue below when bringing a case from a state court was discussed by this Court in *Webb,* 451 U.S. at 495-499. This Court held that it has a long settled jurisdictional rule precluding the re-examination of the final judgment of a state court if the record fails to show either expressly or by clear implication that a federal claim was adequately raised in the state courts. 451 U.S. at 496, 497. The Court cited several cases which uphold the rule that it refuses to decide federal constitutional issues raised for the first time on review of state court decisions. 451 U.S. at 498, 499.

This case is clearly one which falls within the scope of the rule explained in *Webb*. The U.S. Supreme Court does not have jurisdiction in this case, and should not grant certiorari.

II.

Petitioners Have Not Been Denied Access to the Courts Unconstitutionally

A.

The Mississippi Supreme Court Could Sustain the Lower Court's Decision to Grant Summary Judgment on Any Grounds for which there was Basis in the Record.

In the case at bar the Mississippi Supreme Court upheld the trial court's dismissal of petitioner's lawsuit against the Highway Commission. However, the Mississippi Court upheld the dismissal on the grounds that the Highway Commission was entitled to sovereign immunity, instead of the exclusionary language in the insurance policy issued by petitioners which was relied on by the trial court in its dismissal.

It has long been held that an appellate court may sustain a lower court's decision on other grounds than those on which the lower court based its decision. *Davis vs. Packard*, 31 U.S. 41, 48 (6 Pet. 41) (1832). *M'Clung vs. Silliman*, 19 U.S. 598, 603 (6 Wheat. 598) (1821).

"The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." 19 U.S. at 603. In a more current ruling this Court held that the Circuit Court of Appeals must uphold a decision of the Board of Tax Appeals which was correct even though the lower court gave a

wrong reason for its action. *J.E. Riley Inv. Co. vs. Commissioner of Internal Revenue,* 311 U.S. 55, 59 (1940).

In a case in which the Mississippi Supreme Court found two independently dispositive reasons why as a matter of law the appellants were not entitled to the relief they requested on appeal, the Court held that appellees are entitled to argue any grounds sufficient to sustain the judgment or reject the appeal. *Ferguson, et al. vs. Watkins,* 448 So. 2d 271, 275 (Miss. 1984). The Mississippi Court has also consistently held that if the action of the trial judge can be upheld for any reason it must be affirmed. *Chatham vs. Johnson,* 195 So.2d 62 (Miss. 1967). The Mississippi Court also holds that if the trial court reaches the correct conclusion, although for the wrong reason, the lower court decision will be upheld. *Taylor vs. F. & C. Contracting, Inc.,* 362 So.2d 625, 628 (Miss. 1978). *Briggs vs. Benjamin,* 467 So.2d 932, 934 (Miss. 1985)

The Mississippi Supreme Court was acting within its authority in upholding the trial court's dismissal on grounds other than those on which the trial court relied. Petitioners were not denied any constitutionally protected right by the Mississippi Court's action.

B.

***Robinson vs. Ariyoshi* Does Not Apply To This Case**

Petitioners' argument relies heavily on the case of *Robinson vs. Ariyoshi,* 441 F.Supp. 559 (D. Hawaii 1977) (Robinson I). This case is not analogous to the current case.

This case was one link in a chain of cases which began in the state court of Hawaii for the determination of certain water rights of the parties. 441 F.Supp. at 562-563. See also, *Robinson vs. Ariyoshi*, 887 F. 2d 215, 216-218 (9th Cir. 1989), in which the complaints in Robinson I were ultimately ordered dismissed. 887 F.2d at 219.

The plaintiffs in Robinson I were complaining of an action in which the Supreme Court of Hawaii abrogated previously existing state water rights law, and declared new water rights doctrine for the state of Hawaii sua sponte without argument from any of the parties. 441 F.Supp. at 563-564. In the case at bar, the Mississippi Supreme Court has not made new law. The Mississippi Court, in the case at bar, simply relied on different legal grounds, the existing state law of sovereign immunity, to uphold the decision of the lower court.

The Mississippi Supreme Court did not make new law, nor did it make findings of fact ab initio. Petitioners' assertion that this occurred is not accurate.

CONCLUSION

This Court does not have jurisdiction in this action due to the fact that the petitioners did not raise a constitutional claim in the state court. *Webb vs. Webb*, 451 U.S. 493 (1981).

In addition, the Mississippi Supreme Court was clearly within its authority to uphold the trial court's

dismissal of the petitioners' complaint on legal grounds other than those relied upon by the trial court.

Respectfully submitted,

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